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Survey of Recent Aviation Decisions

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SURVEY OF RECENT AVIATION DECISIONS

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I. RECENT DECISIONS

Introduction

DURING 1974 there were a number of significant developments in aviation law. The scope of this article will be limited to an overview discussion, highlighting the most significant decisions during this period. The decisions discussed are indicative of the evolutionary trend of aviation law: meeting the ever pressing needs of a modern technological society wherein consumer protection occupies a position of prominence in the hierarchy of the American judiciary's value system. Although generalizations are usually not of significant value in an unsettled area of the law, a few generalizations can be made. The courts continue to (1) construe insurance coverage questions against the insurer and in favor of the insured,[1] (2) construe guest statutes unconstitutional,[2] (3) broaden

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[1] *See* Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989 (2d Cir. 1974); Braun v. Insurance Co. of N. America, 488 F.2d 1066 (5th Cir. 1974); Woods v. Insurance Co. of N. America, 38 Cal. App. 3d 144, 113 Cal. Rptr. 82 (1974); Southwestern Life Ins. Co. v. Rawsey, 514 S.W.2d 802 (Tex. Civ. App. 1974, no writ); Insurance Co. of N. America v. Maurer, 505 S.W.2d 931 (Tex. Civ. App. 1974, writ ref'd n.r.e.).

[2] *See* Ayer v. Boyle, 37 Cal. App. 3d 822, 112 Cal. Rptr. 636 (1974) (airline

the overall duty of the air carrier with regard to passenger safety,[3] and (4) render decisions which are mutually incompatible, based primarily upon conflicts of law concepts.[4]

For the sake of comprehension and analysis, the 1974 decisions are categorized according to subject matter.

Air Carriers

In *Saurez v. Trans World Airlines, Inc.*,[5] the Seventh Circuit Court of Appeals rendered a decision of significant importance concerning an air carrier's duty toward a potential passenger who appears to be in a disabled condition. In *Saurez*, the facts indicated that upon Mrs. Saurez' arrival at the airport, she was placed in a TWA wheelchair, and wheeled to the TWA ticket line. Thereafter, some difficulties developed with regard to Mrs. Saurez's right to purchase the airline ticket on an American Express credit card. Because of complications in verifying the plaintiff's right to use the American Express credit card, the plaintiff was left unattended in the airport lobby for some two hours and she ultimately missed her flight. Since the plaintiff had not purchased a ticket on the airlines, the trial court refused to give the ordinary jury instruction concerning a common carrier's duty of care toward a passenger, holding that the plaintiff was not a passenger. Therefore, the trial court rendered a judgment on the jury verdict for the defendant. On appeal, the Seventh Circuit reversed the decision of the trial court, holding specifically that under Illinois law "payment of the fare is not a prerequisite to acquiring the status of a passenger."[6] Additionally, the court gave significance to the fact that Mrs.

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guest statute); Messmer v. Ker, 96 Idaho 75, 524 P.2d 536 (1974) (airline guest statute); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974) (automobile guest statute).

[3] Saurez v. Trans World Airlines, Inc., 498 F.2d 612 (7th Cir. 1974). *See* Allegheny Airlines, Inc. v. United States, 504 F.2d 104 (7th Cir. 1974); Cronin v. Delta Air Lines, Inc., 19 Ill. App. 3d 1073, 313 N.E.2d 245 (1974). *But see* Shoemaker v. Whistler, 513 S.W.2d 10 (Tex. 1974).

[4] *Compare* Allegheny Airlines, Inc. v. United States, 504 F.2d 104 (7th Cir. 1974) *with* Shoemaker v. Whistler, 513 S.W.2d 10 (Tex. 1974). *Compare* Kelley v. Central Nat'l Bank, 345 F. Supp. 737 (E.D. Va. 1972) and Mann v. Henderson, 314 N.C. 338, 134 S.E.2d 626 (1964) *with* Colditz v. Eastern Airlines, Inc., 529 F. Supp. 691 (S.D.N.Y. 1971) and Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962).

[5] 498 F.2d 612 (7th Cir. 1974).

[6] *Id.* at 615.

Saurez was apparently disabled when she reached the airport, stating that under Illinois law a common carrier must bestow on disabled passengers a degree of care "beyond that due to an ordinary passenger."[7] The court specifically refrained from addressing the issues of whether the public wheelchair itself was a common carrier, or whether providing the wheelchair itself gave rise to the duty to exercise extraordinary care for the passenger.[8] The answer to these questions are not necessary, however, since the fact of the wheelchair's presence should convey knowledge to the common carrier of the passenger's "disabled" condition, thus giving rise to the carrier's duty to exercise extraordinary care.

In *Allegheny Airlines, Inc. v. United States*,[9] the Seventh Circuit Court of Appeals affirmed a decision which held a pilot training school responsible for the negligence of a student pilot.[10] The district court, applying Indiana law, held that the defendant company which rented an aircraft and provided both ground and flight instructions, was engaged in a joint enterprise with the student pilot, and was therefore responsible for the pilot's negligence. The court set forth the essential elements of a joint enterprise as:

> (1) A community of interest in the object and purpose of the undertaking; (2) an equal right to direct and govern the conduct of the other participant in respect thereto; and (3) a contract, either express or implied to that effect.[11]

The *Allegheny Airlines*[12] decision is to be contrasted with a decision of the Texas Supreme Court in *Shoemaker v. Whistler*,[13] wherein the Texas Supreme Court limited the responsibility for tort liability under the joint enterprise theory to a joint enterprise having a "business or pecuniary purpose."[14] In doing so, the Texas

[7] *Id.* at 616. Applying Illinois law, the court stated

> [W]hen a common carrier knows that a passenger is affected by a physical or mental disability which increases the hazards of travel, a degree of attention should be bestowed on his safety beyond that due to an ordinary passenger in proportion to the liability to injury from the want of it.

[8] *Id.* at 617.

[9] 504 F.2d 104 (7th Cir. 1974).

[10] *Id.* at 114.

[11] *Id.* at 113.

[12] 504 F.2d 104 (7th Cir. 1974).

[13] 513 S.W.2d 10 (Tex. 1974).

[14] *Id.* at 17.

Supreme Court overruled several precedents to the contrary,[15] adopting *in toto* Section 491 of the Restatement (Second) of Torts.[16] The *Shoemaker* court noted that the airplane was engaged in a voluntary civil air patrol search mission at the time of the accident, and thus the joint owners of the airplane had no pecuniary interest in the common purpose of the search; therefore the negligence of the pilot owner could not be imputed to the passenger-owner.[17]

In *Kohr v. Allegheny Airlines, Inc.*,[18] the Seventh Circuit, in a landmark decision, announced that claims for contribution and indemnity resulting from midair aviation collisions are to be controlled by the federal common law.[19] The *Kohr* court articulated a number of reasons for applying a federal law of contribution and indemnity to midair collisions,[20] and then formulated the new federal

[15] *Id.* The court stated:

> While the broader definition of joint enterprise (not requiring a pecuniary interest) has been previously endorsed by this court, *Leeper, Straffus, Nelson, Bonney*, we have determined that the definition set forth in the RESTATEMENT § 491, Comment C, is better reasoned and is adopted. By limiting the application of the doctrine to an enterprise having a business or pecuniary purpose, we will henceforth be avoiding the imposition of a basically commercial concept upon relationships not having this characteristic.

[16] RESTATEMENT (SECOND) OF TORTS § 491, Comment C (1965). This section provides, in pertinent part:

> The elements which are essential to a joint enterprise are commonly stated to be four: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

[17] 513 S.W.2d 10, 17 (Tex. 1974).

[18] 504 F.2d 400 (7th Cir. 1974).

[19] *Id.* at 403.

[20] *Id.* at 403-04. The court stated:

> The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second purpose of eliminating inconsistency of result in similar collision occurrences as well as within the same occurrence due to the application of differing state laws on contribution and indemnity. Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied. . . . To that end, it has been recognized that the principal purpose of the Act (Federal Aviation Act) is to create one unified system of flight rules and to centralize in the Administrator of the Federal Aviation

common law of contribution and indemnity.[21] The *Kohr* decision is obviously of substantial interest to the aviation industry since the decision could provide some uniformity to aviation suits, at least in the federal courts. On the other hand, any significant expansion of the federal common law to other substantive issues could cause litigants to "forum shop."

In *Cronin v. Delta Airlines, Inc.*,[22] the Illinois Appellate Court held that an air carrier had a duty to exercise ordinary care in the maintenance of the portions of the terminal that passengers can reasonably be expected to utilize.[23] In *Cronin*, the plaintiff, after deboarding, was injured as a result of a fall on an escalator leading to Delta's baggage claim area. The trial court held, as a matter of law, that the carrier owed the passenger no duty to maintain this

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Administration the power to promulgate rules for the safe and efficient use of the country's airspace. (citation omitted) When the notion of federal preemption over aviation is viewed in combination with the fact that this litigation ensues from a midair collision occurring in national airspace, that the Government is a party to the action pursuant to the Federal Tort Claims Act (28 U.S.C. § 1346(b) *et seq.* (1970)), and that this litigation has since its inception been subject to the supervision of the Judicial Panel created by the Multidistrict Litigation Act (28 U.S.C. § 1407 *et seq.* (1970)), there is no perceptible reason why federal law should not be applied to determine the rights and liabilities of the parties involved. The interest of the state wherein the fortuitous event of the collision occurred is slight as compared to the dominant federal interest. Accordingly, the rights and liabilities of Allegheny and the United States are peculiarly federal in nature and are to be governed by a federal rule of contribution and indemnity.

[21] *Id.* at 405. The court stated:

Having determined that a federal rule of contribution and indemnity among joint tort-feasors should control in aviation collisions, we reject as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of "no contribution." We agree that "[t]here is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiffs' whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." (citation omitted)

In our judgment the better rule is that of contribution and indemnity on a comparative negligence basis. Under such an approach the trier of fact will determine on a percentage basis the degree of negligent involvement of each party in the collision. The loss will then be distributed in proportion to the allocable occurring fault.

[22] 19 Ill. App. 3d 1073, 313 N.E.2d 245 (1974).

[23] *Id.* at ___, 313 N.E.2d at 248.

area of the terminal. On appeal, the appellate court reversed, following a significant line of decisions indicating that the air carrier's duty to care for the passengers extends to areas in the terminal facilities leased to it and reasonably utilized by the passengers.[24]

In *Goldhirsch v. Air France*,[25] a New York City civil court, following a trilogy of the federal district court cases, held that an air carrier is not required to give "actual notice" of its reconfirmation requirements since such requirements are contained in a tariff regulation and passengers are charged as a matter of law with constructive notice of the carrier's filed tariffs.[26] The *Goldhirsch* decision is representative of the 1974 decisions applying the limitations contained in the Warsaw convention and airline tariff agreements.[27] The courts have consistently afforded airlines the benefits of these limitations, despite repeated attacks on their validity.[28]

Guest Statutes

The 1974 decisions continue the trend established in 1973 of holding airplane guest statutes unconstitutional. Such statutes were held unconstitutional in *Messmer v. Ker*,[29] and *Ayer v. Boyle*.[30] On the other hand, there is a decisive split in the courts on the constitutionality of automobile guest statutes. Automobile guest statutes were held unconstitutional in Kansas,[31] Idaho,[32] and North Da-

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[24] *Id.* at ___, 313 N.E.2d at 247-48.

[25] 3 Av. L. Rep. 17,307 (N.Y. City Civ. Ct. Sept. 27, 1974).

[26] *Id.* at 17,308. The court stated:

> Actual notice is not essential with respect to matters required or authorized to be included in a tariff or tariff regulation and passengers are as a matter of law charged with constructive notice of such tariffs as filed pursuant to law.

[27] Ludecke v. Canadian Pac. Air Lines, Ltd., 3 Av. L. Rep. 17,454 (Ct. App. Montreal, Quebec Dec. 23, 1974); Canadian Pac. Air Lines, Ld. v. Montreal Trust Co., 3 Av. L. Rep. 17,456 (Ct. App. Montreal, Quebec Dec. 23, 1974); Butler's Shoe Corp. v. Pan Am. World Airways, Inc., 3 Av. L. Rep. 17,182 (N.D. Ga. June 5, 1974).

[28] *See, e.g.*, Brentwood Fabrics Corp. v. KLM Royal Dutch Airlines, 3 Av. L. Rep. 17,426 (N.Y. City Civ. Ct. June 26, 1970) and cases cited in note 27 *supra*.

[29] 96 Idaho 75, 524 P.2d 536 (1974).

[30] 37 Cal. App. 3d 822, 112 Cal. Rptr. 636 (1974).

[31] Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974).

[32] Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974).

kota,[33] whereas, such statutes were held constitutional in Oregon,[34] Colorado,[35] Delaware,[36] Illinois,[37] Iowa,[38] and Nebraska.[39]

Res Ipsa Loquitur

Among the legal problems to which the growth of aviation has given rise is the application in aviation accidents of the doctrine of *res ipsa loquitur* ("the thing speaks for itself"). The doctrine of *res ipsa loquitur*, as applied in negligence actions generally, has been variously defined, and there is some difference of opinion as to its application and effect. The doctrine may be stated very generally to be that when an injury is caused by an instrumentality under the exclusive control or management of the defendant and the occurrence does not ordinarily happen in the absence of negligence, an inference of negligence on the part of the defendant may be drawn from the occurrence itself, without proof of any specific negligent act or omission which will support a finding in favor of the plaintiff in the absence of evidence to explain the occurrence on any other reasonable hypothesis.

The appropriateness of the doctrine of res ispa loquitur to aircraft crash cases split the courts in the past.[40] For example, in 1964 the North Carolina Supreme Court[41] stated:

> In a case involving an airplane crash the doctrine of *res ipsa loquitur* does not apply, it being common knowledge that aeroplanes do fall without fault of the pilot.[42]

The Tennessee Supreme Court took the opposite view in 1962, holding that the doctrine was applicable to airplane crashes.[43]

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[33] Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974).

[34] Duerst v. Limbocker, 525 P.2d 99 (Ore. 1974).

[35] Richardson v. Hansen, 527 P.2d 536 (Colo. 1974).

[36] Justice v. Gatchell, 325 A.2d 97 (Del. 1974).

[37] Adams v. Continental Cas. Co., 21 Ill. App. 3d 111, 314 N.E.2d 495 (1974).

[38] Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974).

[39] Hale v. Taylor, 192 Neb. 298, 220 N.W.2d 378 (1974).

[40] *Compare* Kelley v. Central Nat'l Bank, 345 F. Supp. 737 (E.D. Va. 1972) and Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964) *with* Colditz v. Eastern Airlines, Inc., 329 F. Supp. 691 (S.D.N.Y. 1971) and Southeastern Aviation, Inc. v. Hurd, 209 Tenn. App. 639, 355 S.W.2d 436 (1962).

[41] Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

[42] *Id.* at ___, 134 S.E.2d at 629.

[43] Southeastern Aviation, Inc. v. Hurd, 209 Tenn. App. 639, 355 S.W.2d 436 (1962).

This split in authority continues in the 1974 decisions.[44] In *Newing v. Cheatham*,[45] the California Court of Appeals, Fourth District, held that the doctrine of *res ipsa loquitur* was applicable to a pilot's responsibility in an aircraft crash.[46] The court set forth the elements of a *res ipsa* case as follows:

> (1) The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.[47]

Analyzing the first element, the trial court took judicial notice of the state of air travel in this country, and concluded that air travel is among the safest forms of travel, and that accidents seldom occur in the absence of negligent or careless conduct of some type on the part of the owner and/or operator of the aircraft, or those who have control over it.[48] The court did not address the question of what proof must be offered to satisfy the second element; rather the court simply stated that the jury should be instructed as follows:

> [T]he trial judge should have instructed the jury if it found from the expert testimony, common knowledge and all the circumstances shown by the evidence that the accident was more probably than not the result of the pilot's negligence, it could infer negligence from the happening of the accident alone.[49]

Thus the courts have not only approved the application of the doctrine of *res ipsa* to aircraft crashes, but also approved a *res ipsa* instruction to the jury.[50]

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[44] *Compare* Newing v. Cheatam, 42 Cal. App. 3d 565, 117 Cal. Rptr. 30 (1974) *with* Campbell v. First Nat'l Bank, 370 F. Supp. 1096 (D. N. Mex. 1974).

[45] 42 Cal. App. 3d 565, 117 Cal. Rptr. 30 (1974).

[46] *Id.* at 572, 117 Cal. Rptr. at 37.

[47] *Id.* at 571, 117 Cal. Rptr. at 36.

[48] *Id.* at 571, 117 Cal. Rptr. at 36.

[49] *Id.* at 572, 117 Cal. Rptr. at 37.

[50] The Texas Supreme Court in Mobile Chemical Co. v. Bell, 517 S.W.2d 245 (Tex. 1974) approved the following instruction in *res ipsa* cases:

> Among the definitions in the forepart of the charge, the trial court may include an explanation of *res ipsa loquitur* similar to the following:
>
> "You are instructed that you may infer negligence by a party but are not compelled to do so, if you find that the character of the

The *Newing* decision is to be contrasted with *Campbell v. First Nat'l Bank of Albuquerque*,[51] in which the United States District Court for the District of New Mexico, applying New Mexico law, held that the doctrine of *res ipsa* was not applicable to the pilot's negligence. The court gave special attention to the requirement in a *res ipsa* case that the plaintiff prove that his injury was "proximately caused by an agency or instrumentality under the *exclusive* control of the defendant" (emphasis added).[52] The court refused to apply the doctrine because the plaintiff did not sufficiently demonstrate that the pilot had control over the aircraft, in its "mechanical and operational aspects," in order to invoke the doctrine.[53] The court stated that the fact that federal regulations make the pilot "directly responsible for . . . the operation of the aircraft" did not compel the conclusion that the defendant had "exclusive control" of the instrumentality.[54] The *Campbell* court reserved decision on the question of whether, because approximately eighty-three percent of all general aviation accidents are attributable to "pilot error," an airline accident is of the "kind which ordinarily does not occur in the absence of negligence of someone," so as to satisfy the first requirement of *res ipsa*.[55]

Although the *Campbell* court avoided decision on the ultimate question of whether the doctrine of *res ipsa loquitur* should be applied to the responsibility of a pilot in an aircraft crash, the implication of the decision is that the doctrine should not be applied. This would appear to be the appropriate resolution since airline crashes can also be attributed to a number of causes other

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> accident is such that it would ordinarily not happen in the absence of negligence and if you find that the instrumentality causing the accident was under the management and control of the party at the time the negligence, if any, causing the accident probably occurred."

517 S.W.2d at 257.

[51] 370 F. Supp. 1096 (D. N. Mex. 1974).

[52] *Id.* at 1098.

[53] *Id.* at 1099.

[54] *Id.* at 1098. The court stated:

> We do not question the plaintiff's assertion that under the applicable federal regulations Birdseye, as "pilot in command," was "directly responsible for, and is the final authority as to, the operation of the aircraft." 14 C.F.R. § 91.3(a) (1973). This does not, however, compel the conclusion that the aircraft was under his exclusive control.

[55] *Id.* at 1098-99.

than pilot error, for example, a defect in either the design or manufacture of the aircraft, or negligence on the part of any number of other individuals associated with the flight of the aircraft. Moreover, one of the predominant purposes of *res ipsa* is to place the burden of proof on the one who is in the best position to explain the accident—the defendant. If the pilot perished in the crash he is obviously not available to explain anything. Thus, at least in the instances where the pilot's lips are sealed by death, the initial justification for invoking the *res ipsa* doctrine is not present. Under such circumstances, it would appear that the doctrine should not be applied.

Negligence

In *Pilgrim Aviation and Airlines, Inc. v. Northeast Airlines, Inc.*,[56] the United States District Court for the Southern District of New York, applying Connecticut law, held that a pilot's violation of Federal Aviation Regulations is negligence *per se* if the pilot acted unreasonably. In determining whether the pilot acted unreasonably, the court instructed the jury that the pilot was to be judged under the standards of a "reasonably prudent airline pilot." This injection of the "reasonable man" standard to the negligence *per se* doctrine is apparently unique to Connecticut law. In any event, the real significance of *Pilgrim* lies in its language concerning Section 91.29 of the Federal Aviation Regulations, which places the responsibility for determining the airworthiness of an aircraft for safe flight on the pilot. The court states that the fact that violation of this regulation can serve as a basis for a finding of negligence *per se* "is not open to question."[57]

Insurance Coverage

A number of recent decisions concerning insurance coverage reveal that the courts are continuing to act on the general proposition that exclusion clauses are to be strictly construed against the insurer.

In *Pan American World Airways, Inc. v. Aetna*,[58] the Second Circuit held that damages caused to the plaintiff's aircraft by members of the Popular Front for The Liberation of Palestine (PFLP)

[56] 3 Av. L. Rep. 17,458 (S.D.N.Y. 1975).

[57] *Id.* at 17,460.

[58] 505 F.2d 989 (2d Cir. 1974).

were covered under the all-risk policy.[59] The facts indicated that the Pan American flight, while on a regularly scheduled flight from Brussels to New York, was hijacked over London about 45 minutes after it had taken off from an intermediate stop in Amsterdam. Two men acting for the PFLP forced the crew of the aircraft to fly to Beirut, where a demolitions expert and explosives were put on board. The aircraft was then flown to Egypt, still under the control of the two men from the PFLP. After the passengers were evacuated the aircraft was totally destroyed. The insurance company denied coverage under several exclusions to its all-risk policy.[60] In an exhaustive opinion, the court applied the doctrine of *contra proferentem, i.e.* that in order for the insurance company to benefit from an exclusion it must demonstrate that an interpretation favoring it is the *only reasonable* reading of at least one relevant exclusion; it is not sufficient to show *a* reasonable interpretation under which the loss is excluded.[61] The court gave detailed attention to the meaning of each exclusion clause, and concluded that none of the exclusions were applicable to the specific facts of the instant case.[62] The court felt that hijacking was a known risk at the time the policy was written, and that the insurance company could have

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[59] *Id.* at 1022.

[60] *Id.* at 1005. The court stated:

> The all-risk insurers rely on all of the following words of exclusion in the all risk policies:
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> "This policy does not cover anything herein to the contrary notwithstanding loss or damage due to or resulting from:
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> 1. capture, seizure . . . or any taking of the property insured or damage to or destruction thereof . . . by any military . . . or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful. . . . ;
>
> 2. war, . . . civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not;
>
> 3. . . . riots, civil commotion."
>
> The all-risk position is that the terms employed define uninterrupted, overlapping areas of exclusion on a continuum of violence. They claim that in terms of approximately increasing scale and organization of violence, "riot," "civil commotion," "insurrection," "military or usurped power," "rebellion," "revolution," "civil war," "warlike operations," and "war" exhaust the possibilities, and that the cause of the loss must be described by at least one of the terms.

[61] *Id.* at 999-1000.

[62] *Id.* at 1005-22.

excluded hijacking by denominating "hijacking" as one of the specific exclusions under the policy.[63]

In *Woods v. Insurance Company of N. America*,[64] a California court of appeals held that the fact that the pilot's medical certificate had expired did not affect coverage under the policy provision which required a pilot to be "properly certified and rated for the flight of aircraft."[65] The court implied that if the insurance company felt that the medical certificate was relevant it could place a specific exclusion into the policy for pilots who are not covered by a current medical certificate.[66]

In *Southwest Life Ins. Co. v. Rowsey*,[67] a Texas court of civil appeals applied unusual logic in affirming coverage for injuries caused in the crash of an "experimental" aircraft. The policy denied coverage for death in an aircraft crash unless "death occurred as a result of travel . . . exclusively as a passenger . . . in a duly registered and certified passenger aircraft being legally operated. . . ."[68] The defendant insurance company argued (1) that the aircraft was not a "certified passenger aircraft" and (2) that the aircraft was not being "legally operated." The insurance company argued that since the airworthiness certificate provided that no person could be carried in the aircraft during flight unless "that person is essential to the purpose of the flight," the aircraft could not be a "passenger" aircraft. The court avoided this contention, reasoning that since the terms "registered and certified passenger aircraft" were not defined in the policy and the FAA did not have classifications for "passenger aircraft," this limitation should not be afforded any significance. The court stated that since the experimental aircraft in question was capable of carrying passengers, it was a "passenger aircraft." The defendant argued that since plaintiff claimed he was riding "exclusively as a passenger," the aircraft was being operated in violation of the provision in the airworthiness certificate requiring that only "persons essential to the flight" be on board; thus the aircraft was being "unlawfully operated." The court rejected

[63] *Id.*

[64] 38 Cal. App. 3d 144, 113 Cal. Rptr. 82 (1974).

[65] *Id.* at 147, 113 Cal. Rptr. at 84.

[66] *Id. See also* Insurance Co. of N. America v. Maurer, 505 S.W.2d 931 (Tex. Civ. App. Austin 1974, writ ref'd n.r.e.).

[67] 514 S.W.2d 802 (Tex. Civ. App. Austin 1974, no writ).

[68] *Id.* at 804.

this contention, holding that the operation of the plane in violation of the airworthiness certificate does not mean that the plane is being "unlawfully operated."[69] The court noted that the insurance company could have excluded operation of the aircraft in violation of an airworthiness certificate, but did not do so, and therefore could not complain.[70]

The *Aetna, Woods*, and *Rowsey* trilogy of decisions indicate that the courts are ostensibly looking to what the insurance company could have excluded, and giving this finding substantial weight in determining whether or not a given situation is excluded under the general terms of the policy.

On the other hand, in *Braun v. Ins. Co. of N. America*,[71] the Fifth Circuit construed the word "affiliate" in a policy exclusion to include a "parent corporation." The court stated that the use of the word "affiliate" in the exclusion was meant to include any of the separate corporate entities within the corporate structure, whether vertical, diagonal, or horizontal.[72] And, in *Gustafson v. National Insurance Underwriters*,[73] a Texas court of civil appeals held that a person who had been riding in an airplane, and, after landing on the ground, jumped from the wing of the aircraft and raised her hand which was struck by the whirling blades of the propeller, was "alighting" from the aircraft, and therefore, was a passenger within the meaning of the terms of the policy which excluded coverage for actions by passengers.[74]

In *Melton v. Ranger Ins. Co.*,[75] the defendant Ranger insured Van under an aviation policy. Van leased a plane to Melton which was involved in an accident and Ranger denied coverage. Plaintiff alleged that the policy was ambiguous in that it was stated in the "Purpose of Use" that insured planes would be used for rentals, although there was a specific provision that the policy did not cover persons renting the aircraft. The Texas court of civil appeals held that the implication of the "Purpose of Use" would not over-

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[69] *Id.* at 806.

[70] *Id.*

[71] 488 F.2d 1066 (5th Cir. 1974).

[72] *Id.* at 1067-68.

[73] 517 S.W.2d 414 (Tex. Civ. App. Eastland 1974).

[74] *Id.* at 416-17.

[75] 515 S.W.2d 371 (Tex. Civ. App. Fort Worth 1974).

ride the express provision and that the policy did not cover the renter of the plane.[76]

Air Traffic Controllers

In *Todd v. United States*,[77] the United States District Court for the Middle District of Florida held that an air traffic controller has a duty to issue altitude clearances over and beyond the duty to issue clearances in accordance with FAA manuals, when such clearances are "reasonably designed to insure the safety of aircraft flight."[78] In doing so, the court added a fifth element to the standards of duty imposed upon the pilot and air traffic controller under the prior decision of the Fifth Circuit in *American Airlines, Inc. v. United States*.[79] The *Todd* court stated:

> In a very thorough consideration of the standards of duty imposed upon the pilot and ATC the United States Court of Appeals for the Fifth Circuit in *American Airlines, Inc. v. United States* [11 Avi. 17,156] 418 F.2d 180 (5th Cir. 1969) set forth the following:
> 1. The pilot is in command of the aircraft, is directly responsible for its operation, and has final authority as to its operation.
> 2. Before a pilot can be held legally responsible for the movement of his aircraft he must know, or be held to have known, these facts which were then material to its safe operation. Certainly the pilot is charged with that knowledge which in the exercise of the highest degree of care he should have known.
> 3. The air traffic controller must give the warnings specified by the manuals.
> 4. The air traffic controller, whether or not required by the manuals, must warn of dangers reasonably apparent to him but not apparent, in the exercise of due care, to the pilot. 418 F.2d at 193.
> To these the court would add a fifth requirement appropriate to the issues of this case:
> 5. Determined by the facts of the particular case, due care requires an air traffic controller to issue clearances in accordance with the FAA manuals, and over and beyond the requirements of the manuals, the clearances issued must be reasonably designed to insure the safety of aircraft flight.[80]

In addition to *Todd v. United States*,[81] two other decisions are

[76] *Id.* at 374.
[77] 384 F. Supp. 1284 (M.D. Fla. 1974).
[78] *Id.* at 1291.
[79] 418 F.2d 180 (5th Cir. 1969).
[80] 384 F. Supp. 1284, 1291 (M.D. Fla. 1974).
[81] *Id.* at 1291.

of significant interest based on their factual distinctions. In *Robinson v. United States*,[82] the United States District Court for the Northern District of Texas held that the air traffic controller did not have a duty to warn of wake turbulence that occurred five minutes before the accident. This finding was based upon the general rule that air traffic controllers have a duty to warn of wake turbulence only if it is reasonably foreseeable. In contrast, in *Dickens v. United States*,[83] the United States District Court for the Southern District of Texas held that the air traffic controller, under the circumstances of that case (a three-minute lapse), was under a duty to give a wake turbulence warning.

Wrongful Death—Admiralty

In *Roberts v. United States*,[84] the Ninth Circuit held that the Suits in Admiralty Act (SIA), as amended, encompasses aviation wrongful death actions against the United States arising under the general maritime law or under the Death on The High Seas Act.[85] The court recognized that the Supreme Court of the United States in *Executive Jet*[86] had expressly reserved decision on the question presented.[87] The court analyzed the facts presented in light of *Executive Jet*, and concluded that *Executive Jet* could be distinguished since the aircraft in the instant case was engaged in "transoceanic transportation of cargo" which was readily analogized with "traditional maritime activity."[88] In this regard, the court stated:

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[82] 3 AV. L. REP. ¶ 17,333 (N.D. Tex. 1972), *aff'd per curiam*, 475 F.2d 1403 (5th Cir. 1973).

[83] 378 F. Supp. 845 (S.D. Tex. 1974).

[84] 498 F.2d 520 (9th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974).

[85] *Id.* at 526.

[86] Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).

[87] Roberts v. United States, 498 F.2d 520, 523-24 (9th Cir. 1974). The court quoted from *Executive Jet* as follows:

> We need not decide today whether an aviation tort can ever, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction in the absence of legislation. It could be argued, for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute. An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by water-borne vessels.

[88] *Id.* at 524.

> An examination of the record provides several bases for distinguishing the air accident in this case from the crash which occurred in *Executive Jet*. According to appellee's amended complaint, the Flying Tiger Lines aircraft was engaged in transporting cargo between Los Angeles and Viet Nam; Okinawa was merely one of a number of intermediate stopping points. Geographic realities, therefore, do not make the cargo plane's contact with navigable waters entirely "fortuitous." More significantly, the trans-oceanic transportation of cargo is an activity which is readily analogized with "traditional maritime activity. . . ." Indeed, before the advent of aviation, such shipping could only be performed by waterborne vessels. We therefore do not interpret *Executive Jet, supra*, as precluding a maritime action on the facts of this case.[89]

Hijacking

In *Rosman v. Trans World Airlines, Inc.*,[90] a New York court of appeals was faced with a claim for mental distress suffered in an airline hijacking situation. The court looked to Article 17 of the Warsaw Convention and noted that recoveries were allowed for "bodily injuries" only. The court stated that the term "bodily injury" connotes palpable, conspicuous, physical injury and excludes mental injury with no observable "bodily," as distinguished from "behavioral" manifestations.

In *Edwards v. National Airlines, Inc.*,[91] the court held that an air carrier could be responsible for injuries plaintiff suffered by eating contaminated food in Cuba. The plaintiff alleged the airline was negligent in allowing the aircraft to be hijacked, and as a result of that negligence plaintiff was forced to reside in quarters furnished by the Cuban government, and, in order to sustain herself, to eat "dangerous and illness-causing" foods. The court held that this complaint was sufficient to state a cause of action, and that the damages were not so remote as to render the complaint vulnerable to a motion to dismiss.[92]

In *Northwest Airlines, Inc. v. Globe Indemnity Co.*,[93] the Minnesota Supreme Court held that the air carrier could recover the ransom paid to recover a hijacked aircraft, under the carriers

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[89] *Id.*

[90] 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

[91] 307 So.2d 244 (Fla. App. 1974).

[92] *Id.* at 245-46.

[93] 225 N.W.2d 831 (Minn. 1975).

"blanket crime policy."[94] The court held this was a "wrongful abstraction" within the meaning of the policy.[95] In *Pan American World Airways, Inc. v. Aetna*[96] (discussed in detail in the insurance section), the Second Circuit upheld coverage under an "all-risk" policy for the destruction of plaintiff's aircraft by hijackers. Both courts recognized the insurance company's right to exclude damages caused by "hijacking," but stated that such an exclusion would have to be specific.

Manufacturer's Liability

In *Williams v. Cessna Aircraft Corp.*,[97] the United States District Court for the Northern District of Mississippi, applying Mississippi law, held that a manufacturer was under no duty to design its seat and harness assembly to withstand a high speed crash. The court applied the Mississippi substantive law commonly known as the "second accident" doctrine in determining that the manufacturer of the defective seat and harness assembly was not responsible,[98] since the "initial accident" was the crash of the aircraft rather than the failure of the seat and harness.

The *Williams* decision is contrary to several other recent products liability cases which hold that if a manufacturer of a product should be able to reasonably foresee that the product would be involved in some sort of crash, the manufacturer has a duty to make the product reasonably safe. For example, the courts are beginning to recognize this "crashworthiness" concept in automobile accident cases, and are placing a duty on manufacturers to make cars reasonably safe for the occupant's use in the event the automobile is involved in a crash.[99]

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[94] *Id.* at 837.

[95] *Id.* at 835.

[96] 505 F.2d 989 (2d Cir. 1974).

[97] 376 F. Supp. 603 (N.D. Miss. 1974).

[98] *Id.* at 607. The court stated:

> Mississippi law precludes imposition of liability on the basis of a "second accident" where the alleged defect did not cause or contribute to the initial mishap and did not arise from the intended normal use for which the product was manufactured.

[99] Perez v. Ford Motor Co., 497 F.2d 82 (5th Cir. 1974); Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974).

Noise—Inverse Condemnation

In *Aaron v. City of Los Angeles*,[100] the California court of appeals held that the municipal operator of an airport is liable for a taking or damaging of property when the following elements are satisfied: (1) the owner of property in the vicinity of the airport can show a measurable reduction in market value of his property; (2) the reduction results from the operation of the airport in a manner that the noise from aircraft causes a substantial interference with the use and enjoyment of the property; and (3) the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking. Whether the interference is "substantial" is a mixed question of fact and law for the trial judge to determine.[101] The *Aaron* court rejected the theory that the aircraft must actually violate the airspace above the plaintiff's land before responsibility arises.[102]

In a companion case,[103] the court held that the air carriers operating at the municipal airport which was involved in *Aaron v. City of Los Angeles* would not be liable to the adjacent property owners in an inverse condemnation action, since only governmental agencies can take property.[104] Further, the court refused to hold the air carriers responsible to the municipality even though the carriers had agreed to indemnify the municipality since the municipality was not responsible under traditional tort liability.[105]

In *Pueblo of Sandia v. Smith*,[106] the Tenth Circuit affirmed a summary judgment for defendants, stating that a landowner cannot recover unless he alleges and proves that low-level flights "are in the immediate reaches of, and interfere with the actual use of, his land."[107] The mere traversing of airspace above a plaintiff's land, without injury, is not actionable.

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[100] 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974).

[101] *Id.* at 493, 115 Cal. Rptr. at 177.

[102] *Id.* at 484, 115 Cal. Rptr. at 171.

[103] City of Los Angeles v. Japan Airlines Co., 41 Cal. App. 3d 416, 116 Cal. Rptr. 69 (1974).

[104] *Id.* at 426-27, 116 Cal. Rptr. at 76-77.

[105] *Id.* at 428, 116 Cal. Rptr. at 77-78.

[106] 497 F.2d 1043 (10th Cir. 1974).

[107] *Id.* at 1045.

II. AMENDMENTS AND PROPOSED AMENDMENTS TO REGULATIONS AND STATUTES

Introduction

During 1974, a number of new laws, amendments, and proposals were announced which should be of some general interest to the aviation bar. Some of these amendments and proposed amendments are discussed herein for the general benefit of the symposium. This discussion is not intended, however, to exhaust all 1974 amnedments which relate to aviation law.

Transportation Safety Act

The President signed Public Law 93-633 on January 3, 1975, entitled the "Transportation Safety Act of 1974."

Title I of this enactment is titled the Hazardous Materials Transportation Act[108] and is designed to improve the regulatory and enforcement authority of the Secretary of Transportation in order to protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce. Among its provisions, it requires the Secretary to issue regulations regarding the transportation of radioactive materials on any passenger-carrying aircraft. These regulations are required to prohibit any such transportation unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment, and are packaged in such a way that they do not pose an unreasonable hazard to health and safety. In addition, Title I amends Sections 901(a) and 902(h) of the Federal Aviation Act of 1958, and Sections 6(c) and 6(f) of the Department of Transportation Act to conform the provisions of these sections to the new act.[109]

Noise Standards

The Federal Aviation Administration has amended Parts 21 and 36 of the Federal Aviation Regulations to prescribe noise standards for the issuance of normal, utility, acrobatic, transport, and restricted category type certificates for propeller driven small aircraft, to prescribe noise standards for the issuance of standard airworthiness certificates and restricted category airworthiness certifi-

[108] 49 U.S.C. §§ 1801 *et seq.* (1975).

[109] 1 AV. L. REP. ¶¶ 1452, 2909, 2911 (1975).

cates for newly produced propeller driven small aircraft of older type designs, and to prohibit "acoustical changes" in the type design of those aircraft that increase their noise levels beyond specified limits.[110]

Multidistrict Litigation Rules of Procedure

The Judicial Panel on Multidistrict Litigation has issued an extensive revision of its rules of procedure. The new rules are to be effective on February 14, 1975. Among the changes, the Panel has added specific rules regarding matters submitted to the Panel on briefs on the effect of the pendency of an action before the Panel.[111]

Proposals

First Biennial Airworthiness Review

The First Biennial Airworthiness Review conference was held in Washington, D.C. on December 2 through December 11, 1974. A number of significant proposals concerning federal aviation regulations were submitted for review. These proposals mirror the dedication of the aviation industry toward improving the overall safety of air transportation. Representatives from more than 20 nations registered for the conference, along with a number of U.S. government agencies, trade organizations, and individual companies comprising the national and international aviation community. With the inception of the Biennial Review Conferences, the Federal Aviation Administration can now conduct a comprehensive, across-the-board, substantive review of its airworthiness regulations.

Proposals were made to establish stall and minimum steady flight speeds where none currently exist,[112] to require an adequate stall warning in terms of a speed and/or a time margin when entry to stall is made from yaw flight or from an accelerated entry,[113] to include a new rule standardizing alarms,[114] to require a takeoff warning system to alert the crew when wing flaps, spoilers, leading edge devices, elevator/stabilizer trim and any other critical devices

[110] 40 Fed. Reg. 1061 (1975); 1A Av. L. Rep. ¶¶ 4202, 4559A (1975).

[111] 28 U.S.C. § 1407 (1970).

[112] Proposed Amendment to F.A.R. 23.49.

[113] Proposed Amendment to F.A.R. 23.207.

[114] Proposed Amendment to F.A.R. 25.

are not in a position to assure a successful takeoff,[115] to add a new section requiring a takeoff warning horn which will indicate a flap setting error within preset tolerances,[116] to add a regulation requiring a comprehensive standardized warning system, where none currently exists,[117] to provide for additional fire detector systems,[118] to require a low fuel warning system to give an oral or visual warning to the pilot when fuel reaches an amount equal to that which would give 20 minutes flight,[119] to update the requirements for issuance of type certification,[120] to establish uniform continued airworthiness instruction standards for all classes of aircraft,[121] and to require anti-collision warning lights.[122]

Noise Standards

The Federal Aviation Administration is considering amending Parts 21 and 36 of the Federal Aviation Regulations to reflect proposed regulations submitted to it by the Environmental Protection Agency (EPA) regarding noise standards for propellor driven small aircraft.[123] The EPA proposals would prescribe noise standards for the issuance of normal, utility, acrobatic, transport, and restricted category type certificates for propeller driven small aircraft, prescribe noise standards for the issuance of standard airworthiness certificates and restricted category airworthiness certificates for newly produced propeller driven small aircraft of older type designs, and prohibit "acoustical changes" in the type design of those aircraft that increase their noise levels beyond specified limits.[124]

The Federal Aviation Administration is also considering amending Part 91 of the Federal Aviation Regulations to reflect an EPA proposal regarding noise abatement minimum altitudes for turbojet powered aircraft in terminal areas. Specifically, the EPA proposals would add a regulatory definition of the term "terminal

[115] Proposed Amendment to F.A.R. 25.659.

[116] Proposed Amendmen to F.A.R. 25.1307(i).

[117] Proposed Amendment to F.A.R. 25.1322.

[118] Proposed Amendment to F.A.R. 23.1203.

[119] Proposed Amendment to F.A.R. 29.1305(a).

[120] Proposed Amendment to F.A.R. 21.51.

[121] Proposed Amendment to F.A.R. 25.1529(a).

[122] Proposed Amendments to F.A.R. 29.1401, 29.1401(b), and 29.1401(f).

[123] 1 Av. L. Rep. ¶ 3869 (1975).

[124] *Id.*

area" to Part 91 and would prescribe minimum altitudes for turbojet powered aircraft within terminal areas.[125]

Smoke Standards

The Federal Aviation Administration is considering amending Parts 25 and 121 of the Federal Aviation Regulations to establish standards for the smoke emission characteristics of compartment interior materials used in transport category aircraft.[126]

[125] *Id.*

[126] 593 CCH Aviation Law Reports 4 (Feb. 17, 1975).